

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-221745

DATE: April 28, 1986

MATTER OF: Janice M. Simmons - Erroneous Promotion -
De Facto Employment

DIGEST:

An employee was temporarily and then permanently promoted from a GS-4 position to a GS-5 position. It was later discovered that the promotion was erroneous because she did not meet the general experience requirement of the position to which she was promoted. The error was corrected and a Bill of Collection issued. Because she performed the duties of the GS-5 position based on the apparent authority of the promoting personnel, she is to be regarded as a de facto employee and is therefore entitled to retain the compensation of a GS-5.

This decision is in response to a request from the Controller, Department of Energy, that a waiver be granted under 5 U.S.C. § 5584 (1982), for overpayments to Janice M. Simmons totaling \$1,409.31. Ms. Simmons received the excess payments between February 8, 1981, and September 16, 1983, due to an erroneous promotion. The Department requests a waiver because the overpayments resulted from an administrative error by the servicing personnel office and there was no indication of fraud or fault on the part of Ms. Simmons. We find that the issue of waiver need not be reached since Ms. Simmons is entitled to retain the compensation received for the services performed as a de facto employee.

BACKGROUND

The record reveals that on February 8, 1981, Ms. Simmons, a GS-4 for the Western Area Power Administration - Phoenix Office, was temporarily promoted to a GS-5 Support Services Specialist position. On July 12, 1981, Ms. Simmons was permanently promoted to the Support Services Specialist position. Apart from other miscellaneous pay adjustments, Ms. Simmons received within grade increases--in increments of one step each--on February 21, 1982, and February 20, 1983. A personnel management evaluation conducted at the servicing personnel

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office in March 1983 culminated in a report issued on September 9, 1983, which indicated that Ms. Simmons did not qualify for her promotion. Although she fully performed the duties and responsibilities of the position to which she was promoted, apparently Ms. Simmons lacked the requisite 3 years general experience for the Support Services Specialist position until November 8, 1981. Consequently, on September 16, 1983, the improper personnel actions were cancelled and corrected personnel actions were issued. A Bill of Collection in the amount of \$1,409.31, representing the total amount of wage overpayments from the erroneous promotion, followed on March 21, 1984. Subsequently, on April 4, 1984, Ms. Simmons requested a waiver of the entire overpayment.

ANALYSIS

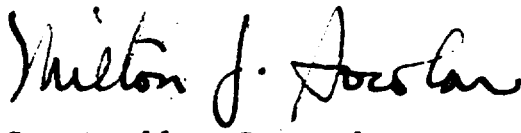
A promotion is a new appointment to a position of higher rank and pay. B-168953, April 10, 1970. Ms. Simmons promotion was, therefore, a new appointment to the Support Services Specialist, GS-5 position. Her appointment was later found to be invalid because she lacked the general experience requirement of the position. We have held that where an appointment is invalid, but the invalidity does not result from an absolute statutory bar, an individual who performs the duties of the position with apparent right and a claim of title to the position is considered a de facto employee and is entitled to retain compensation already received. See 30 Comp. Gen. 228, 229 (1950); 52 Comp. Gen. 700, 701 (1973). Recoupment of payments is only necessitated where there exists an absolute statutory bar which either expressly prohibits the payment of appropriated funds to the employee or requires a refund by the employee. Department of Labor, B-195279, September 26, 1979, citing, 18 Comp. Gen. 815 (1939).

According to the record, Ms. Simmons performed the duties of the position to which she was promoted, and did so in good faith based on the apparent authority of the appointing officer to so promote her. She had no reason to suspect the personnel office's mistake. In short, Ms. Simmons performed the duties of the position under color of appointment with apparent right and claim of title to

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the position. See Marie L. Vaughn, B-219565, February 11, 1986. The invalidity of Ms. Simmons' appointment did not result from an absolute statutory bar expressly prohibiting the payment of appropriated funds to her or requiring a refund from her. Thus, Ms. Simmons is entitled to retain the pay of Support Services Specialist, GS-5, as a de facto employee.

Hence, the Bill of Collection sent to Ms. Simmons on March 21, 1984, was incorrect. Ms. Simmons is, therefore, entitled to retain the additional compensation of \$1,409.31 that she received between February 8, 1981, and September 16, 1983.


for Comptroller General
of the United States